

**Liability Limitation Provisions in H.R. 3210, the “Terrorism Risk Protection Act”**  
**(Prepared by the Democratic Staff of the House Judiciary Committee)**

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Section 15 of H.R. 3210, the “Terrorism Risk Protection Act,” proposes new and unnecessary tort reforms that would be harmful to victims of terrorism. Specifically, the bill federalizes all terrorism liability cases, prohibits judicial review of decisions to federalize such cases, eliminates punitive damages, limits the amount of non-economic damages for which defendants (not just insurers or reinsurers) are liable, mandates collateral source offsets, and imposes caps on attorneys’ fees. The following is a section-by-section of H.R. 3210, Section 15.

**Section 15. Litigation Management**

**Subsection (a). Federal Cause of Action for Claims Relating to Terrorist Acts**

**Section 15(a)(1) – In General:** provides that, if the Secretary of the Treasury decides there has been one or more acts of terrorism, “there shall exist a Federal cause of action, which, except as provided in subsection (b), shall be the exclusive remedy for claims arising out of, relating to, or resulting from such acts of terrorism.” *This is a broadly-written provision that would limit victims’ rights in every conceivable civil action – state or Federal – involving terrorism, even if the insurer is not a party to the action. In addition, the critical term “act of terrorism” is undefined within the text of the legislation and thus grants too much latitude to the Secretary to deem an event an “act of terrorism” and allow wrongdoers to benefit from this section.*

**Section 15(a)(2)– Effect of Determination:** provides that the Secretary’s determinations under section 15(a)(1) shall not be subject to judicial review and shall take effect upon publication in the Federal Register. *This provision raises two significant concerns. First, it is likely unconstitutional because the Constitution has been held to provide for judicial review of actions by the Executive. Second, denying judicial review of the Secretary’s decisions would grant the Secretary wide latitude to make determinations about what events would constitute “acts of terrorism,” such that – as before – a hoax or practical joke could be designated an “act of terrorism.”*

**Section 15(a)(3) – Substantive Law:** states that an action under this section is governed by the law and choice of law principles of the state in which the terrorism occurred.

**Section 15(a)(4) – Jurisdiction:** provides that the Judicial Panel on Multi-district Litigation will designate one court and that court will have exclusive jurisdiction all on cases arising out of a particular terrorist event.

**Section 15(a)(5) – Limits on Damages:** provides a number of limits on damages in actions brought for damages in connection with any type of civil action related to terrorism, not just those pertaining to commercial property and casualty insurance. *These limitations on their face apply in every conceivable action – state or Federal– involving terrorism. In fact, the current version*

of the bill is worse than that reported by the Financial Services Committee because the earlier bill limited damages only in cases involving commercial property or casualty insurance; the current bill applies to any action related to terrorism, regardless of whether an insurance claim is involved.

**Section 15(a)(5)(A):** would prohibit punitive damages and pre-judgment interest. Punitive damages are monetary damages awarded to plaintiffs in civil actions when a defendant's conduct has been found to flagrantly violate a plaintiff's rights. The standard for awarding punitive damages is set at the state level, but they are generally allowed only in cases of wanton, willful, reckless or malicious conduct. These damages are used to deter and punish particularly egregious conduct. Eliminating punitive damages totally undermines the deterrent and punishment function of the tort law. The threat of meaningful punitive damages is a major deterrent to wrongdoing, and eliminating punitive damages would severely undercut their deterrent value since reckless or malicious defendants could find it more cost effective to continue their callous behavior and risk paying small punitive damage awards. This means baggage screening firm would be protected from liability if they hired incompetent employees or deliberately failed to check for weapons and a terrorist act resulted.

Pre-judgment interest liability is an added incentive to move the judicial process along because a delay would result in a penalty of added interest to the judgment. Without the threat of added interest payments, attorneys for defendants may be prone to delay proceedings because the real dollar value of a judgment amount would be reduced, making the judgment the same no matter how long the process. Limiting interest would unfairly affect the judgment award collected by the victims and leave them vulnerable to a delayed judicial process.

**Section 15(a)(5)(B):** provides that a defendant will only be liable for non-economic damages in direct proportion to the percentage of the defendant's responsibility for the victim's harm and prohibits plaintiffs from recovering such non-economic damages unless the plaintiff suffered physical harm. This would alter common law rule of joint and several liability between defendants. Under the traditional rule, where more than one defendant is found liable, each defendant is held liable for the full amount of the damages. The justification for this is that it is better that a wrongdoer who can afford to do so pay more than its share, rather than an innocent victim obtain less than full recovery. Also, a defendant who pays more than its share of damages can seek contribution from the other defendants. By holding each defendant responsible only for its percentage of responsibility, this section would supersede state law by eliminating joint and several liability for non-economic damages in these actions. Also, the prohibition on non-economic damages unless physical harm is suffered raises significant concerns. Essentially, a spouse who suffers loss of consortium could not recover any non-economic damages. This is an unprecedented limitation on victims' rights.

In addition, this provision would shift non-economic costs from wrongdoers to victims and discriminate against groups less likely to establish significant economic damages, such as women, children, minorities, seniors, and the poor. It is unconscionable to put more value on

*the loss of a job than on the loss of a limb, loss of the ability to have children, disfigurement, or other forms of non-economic harms. Also, eliminating joint and several liability for non-economic harms would discourage settlements and thus increase case loads and litigation costs.*

**Section 15(a)(6) – Collateral Sources:** requires that, for compensation of loss related to terrorism, a plaintiff's recovery must be offset by any funds received pursuant to any emergency or disaster relief program or any other collateral source. *There are two problems with this provision. First, a reduction of a victim's award due to collateral source compensation would result in wrongdoers escaping their responsibility. This legislation subtracts any other potential sources of recovery the victim may have from any damages the wrongdoer should pay. Losses caused by negligence or wrongdoing would be shifted from liable defendants to the government, private insurers, or disaster relief organizations who made the "collateral source" payment. Second, the provision is too overreaching. The effect would be to require any funding given to the plaintiff, whether it be from health insurance payment or funds from a voluntary organization, be used to offset relief payments made by culpable defendants. Under this provision, funds received by a victim from the Red Cross must be used to offset relief payments and reduce a wrongdoer's liability.*

**Section 15(a)(7) – Attorney Fees:** provides that attorneys' fees shall be limited to twenty percent of either the damages ordered by a court or any court-approved settlement under this section. Any attorney who charges or receives fees in excess of twenty percent shall be fined not more than \$2,000, imprisoned not more than one year, or both. *Fee caps, which apply only to victims, result in less access to justice for lower-income populations. A payment ceiling or fee cap limits the economic incentive for attorneys to take on complex or difficult-to-prove claims under the contingency fee system; in turn, this would make it much more difficult for lower-income populations to secure good representation. Moreover, the threat of imprisonment is without precedent and could deter attorneys from providing assistance.*

**Section 15(b) – Exclusion:** provides that nothing in section 15 shall limit the liability of a person who attempts to commit, commits, participates, or is engaged in a conspiracy to commit an act of terrorism.

**Section 15(c) – Right of Subrogation:** provides that the United States has the right of subrogation with respect to any claim it paid under this section.

**Section 15(d) – Relationship to Other Laws:** states that nothing in section 15 shall affect either any party's contractual right to arbitrate a dispute, or any provision of the Air Transportation Safety and System Stabilization Act of 2001 (Pub. L. No. 107-42).

**Section 15(e) – Satisfaction of Judgments from Frozen Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism**

**Section 15(e)(1) – In General:** provides that, in any case in which a person obtains a judgment against a terrorist party, the frozen assets of that terrorist party or of any agency or instrumentality of that party shall be available for satisfaction of the judgment. This provision removes foreign sovereign immunity and is designed to ensure that victims of terrorism receive the compensation they are owed, even if the defendant is a foreign state.

**Section 15(e)(2) – Presidential Waiver:** states that the President, on an asset-by-asset basis, can waive the requirements of subsection 15(e)(1) for any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations. *This waiver authority vitiates the protections for victims of state-sponsored terrorism provided for in subsection 15(e)(1). If the President can waive unilaterally any judgment for a victim, then victims could easily receive no compensation for their claims.*